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AFTER-BORN COPARCENERS AND ANTECEDENT ALIENATIONS UNDER THE MITAKSHARA SCHOOL.

By

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There is much uncertainty even at the present day regarding the true nature and precise extent of the rights of an after-born Mitakshara coparcener in joint family property which had been alienated antecedent to his birth by the father or other manager of the family. In the latest edition of Mayne's Hindu Law, published in 1950, it is stated at page 500 (para 398) that doubts as regards his rights must be taken to have been set at rest by the decision of the Privy Council in *Akhara Udasi Nirwani* v. *Surajpal Singh*[1]. With great respect, however, it is submitted that if the actual decision is examined closely in the light of the facts of the case, it will be found that far from settling any of the doubtful points which have been the subject of much debate, their Lordships' pronouncement has unfortunately introduced further complications and uncertainties in the law on this topic. Shorn of immaterial details the facts in *Akhara Udasi Nirwani* v. *Surajpal Singh*[1], were these: One *S*, a Mitakshara Hindu executed a deed of simple mortgage in 1920 in favour of the appellant before the Board securing repayment of a certain sum of money. On that date the hypotheca was held in coparcenary by the mortgagor and his minor son, hereinafter referred to as the eldest son, then aged about two years. Subsequently three other sons, defendants 4 to 6 in the suit out of which the appeal arose, were born to the mortgagor. It is important to note that the eldest son died in the year 1923 at a time when the 4th defendant was a child aged about seven months. Defendants 5 and 6 were born only some years after the death of the eldest son. The mortgagee sued in 1933 on the mortgage of 1920, and sought to enforce the charge against all the members of the family including the interests of defendants 4 to 6. On the date of the suit they were still minors. Defendant 5 died during the pendency of the suit. Defendants 4 and 6 were the principal contesting respondents before their Lordships' Board, on this portion of the case. They denied liability under the suit mortgage on the ground that the debt secured thereby was incurred for purposes not binding on them. Plaintiff met this objection by contending

(*a*) that the defendants 4 and 6 who were not in existence on the date of the mortgage have no *locus standi* to contest the validity of the said alienation as against them;

(*b*) that in any view, the mortgage was binding on them as an alienation by their father for discharge of his antecedent debts. Their Lordships overruled both these contentions. The discussion by their Lordships on the first point is, unfortunately, not as full or as clear as it might well have been, with the result that several difficult questions with which the problem bristles are left unanswered without an authoritative elucidation of the legal principles applicable to the solution of this and similar problems. The whole reasoning on which their Lordships base their conclusion on this point is to be found in the following brief passage in the Judgment delivered by Lord Porter:

"In support of the former proposition it is asserted that a member of a joint family must be content with the family estate as he finds it at his birth, or at any

1. (1944) 2 M.L.J. 395 (P.C.).

rate, he cannot complain of anything done before the period of gestation. Upon this rule it is admitted there is engrafted an exception to the effect that if the child who objects to the alienation of the property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before the alienation, then that overlapping of the two lives enables the later-born child to contest the validity of the father's act."

Then after adverting to the evidence in the case, his Lordship concludes thus:

". . . . . Their Lordships like the High Court think it sufficiently established that the first born son did not die until after the birth of a younger brother and hold that the minor sons are entitled to challenge the validity of the mortgage." No arguments appear to have been addressed to their Lordships and therefore there is no considered discussion by them on the following questions which arise:

(1) Whether each of the after-born sons in the position of defendants 4 to 6 acquires an independent and individual right to the alienated property from the moment of their births, irrespective of the presence or absence on the date of the alienation of other co-parceners besides the alienor?

(2) Are the rights, if any, of such after-born coparceners limited to those of participating in the benefits accruing to the other coparceners who were alive on the date of the alienation by their successful reisistance of the claims of the alienee against the family?

(3) If their rights are so limited, are they further curtailed or lost to them (*viz.*, the after-born coparceners) by the subsequent death of the non-alienating coparceners who were alive at the date of the alienation, without their either affirming or challenging the alienation?

(4) Can the benefit of the principle of "overlapping of the two lives" assumed by their Lordships to be accurate, be extended in favour of and made available to an after-born coparcener in the position of the 6th defendant, who admittedly was conceived and born after the death of the eldest son? or

Is the benefit of the said principle limited only to a coparcener like the 4th defendant? In other words, what is the precise extent and duration of the "overlapping? Is it only an overlapping occurring by the births of new coparceners during the lifetime of the coparcener who was alive at the alienation, or is it also an overlapping that takes place by such subsequent births, even after the death of the non-alienating coparcener alive at the alienation, but during the lives of new-born coparceners coming into existence in the lifetime of the one who was in existence at the time of alienation that takes the case out of the general rule also assumed by their Lordships to be correct that every coparcener acquires on his birth an interest in the family properties as they exist at the time of his birth. Expanding the same idea: Does a coparcener in the position of the 6th defendant answer the description as "a child coming into existence after the alienation but during the life of a child born or conceived before the alienation"? Is it not more appropriate to describe him though the description has necessarily to be cumbruous and hence irrelevant—as a "child coming into existence after the alienation, but during the life of another child also born after the alienation, but before the death of the child in existence at the date of the alienation." On the facts of the case, before their Lordships there was clearly a hiatus or interval of time exceeding the ordinary period of gestation, between the death of the eldest son and the birth of defendants 5 and 6. Does not this circumstance make a vital difference between the 4th defendant on the one hand and the defendants 5 and 6 on the other, as regards their respective rights to attack or resist the alienation? Is the 'gap' effectively bridged by the intervention of the life of the 4th defendant during the interval between the death of the eldest son and the birth of defendants 5 and 6 notwithstanding the fact that the 4th defendant himself is a child born only after the alienation?

(5) Does the principle of "overlapping" continue to operate even after the "overlapping of the two lives" has ceased by the death of the non-alienating

coparcener who was in existence at the alienation? In other words (and this is again question No. (3) above from slightly a different aspect)—

Is a coparcener in the position of the 6th defendant competent in his own right to contest the validity of the mortgage, even after the death of the coparcener who was alive at the time of the alienation and had not assented to it?

The attention of their Lordships does not appear to have been drawn to their own previous pronouncements, nor to the numerous, if also conflicting decisions of the Indian High Courts, (for a complete collection of them—see the Full Bench decision of the Nagpur High Court in *Kashinath* v. *Bapu Rao*[1],) on the questions formulated above.

To arrive at a correct assessment of the value of their Lordships' decision in *Akhara Udasi Nirwani's case*[2], as a binding precedent, it may be fruitful to examine in some detail the full implications of each of the questions propounded above in the light of the principles settled by the earlier authorities and then to see whether these principles require any, and if so, what modifications, in view of their Lordships' pronouncement in the instant case.

(1) The following passage from Mayne furnishes a convenient starting point for the discussion:

"A son or other coparcener cannot object to alienations validly made by his father or other manager before he was born or begotten, because he could only by birth obtain an interest in the property which had not validly passed out of the family before he comes into legal existence. Hence, if at the time of the alienation there had been no one in existence whose assent was necessary or if those who were in existence had consented, he could not afterwards object on the ground that there was no necessity for the transaction." (Mayne's "Hindu Law", 11th Edition, para 398, pages 498-499). See also *Chuttan Lal* v. *Kallu*[3], *Bholanath* v. *Kartick*[4]; *Narain Das* v. *Har Dyal*[5] and the other cases cited under foot-notes (v), (w) of page 499.

Subject to some doubts and differences of opinion as to the meaning and import of the word "validly" occurring in two places in the above extract, this has always been treated as an accurate statement of the law, so far as it goes. But it is not and does not purport to be a complete or comprehensive statement of the law in all its aspects. The decision in *Lachmi Narain Prasad* v. *Kishan Kishore Chand*[6], recognises at least one other contingency—*viz.*, the inaction of the coparcener in existence at the time of the alienation for over the statutory period in not challenging the transaction basides the two specifically mentioned by Mayne in the above passage, as precluding a later born coparcener, from objecting to the alienation. This view equates the failure on the part of the members of the family in existence on the date of the alienation, to set it aside in time with their express consent to it and both are equally effective in removing the property from the family. A coparcener born after the removal of the property from the family by such express consent or passive inaction for over the statutory period, on the part of those in existence at the time of the alienation acquires no rights whatever in the alienated property. It will not be correct to read the above passage in Mayne as laying down by implication the proposition that in all other situations except the two contingencies mentioned in the second sentence of the said passage, *viz.*, the non-existence of another coparcener besides the alienor at the date of the alienation or his assent to it if there was one such in existence on that date, a coparcener born after the alienation is in exactly the same position as if he had been in existence at the date of the alienation. Such a proposition will be too broad. On the other hand the preponderance of judicial opinion indicates the general rule to be:—"that a member of a joint family must be content with the family estate as he finds it at his birth

1. I.L.R. (1940) Nag. 573 (F.B.).
2. (1944) 2 M.L.J. 395 (P.C.).
3. (1910) I.L.R. 33 All. 283.
4. (1907) I.L.R. 34 Cal. 372.
5. (1913) I.L.R. 35 All. 571.
6. (1915) I.L.R. 38 All. 126.

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or at any rate he cannot complain of anything done before the period of gestation ".[1] No doubt this rule is subject to some important exceptions considered below under question No. (2).

After enunciating an exception "admitted" presumably by Counsel, to be engrafted upon this rule, (as quoted above), their Lordships observe in *Akhara Udasi Nirwani's case*[1], that "they did not think it necessary to determine whether this limitation upon the right of an after-born child to resist the claim of an encumbrance upon the family estate correctly expresses the law in all respects" and "were content to assume its accuracy." Unfortunately, the language here is ambiguous. It is not quite clear whether it is the rule or the exception "engrafted upon it" or the composite proposition made up of the rule and exception read together, that is referred to as "this limitation upon the rights of an after-born child." The word "this" points to the immediately preceding proposition which states the exception. But it is very inapt to describe the exception as a "limitation of the rights or an after-born child." The exception extends, and enlarges, rather than limits the rights of the after-born child in certain special circumstances compendiously described as the "overlapping of the two lives." It may be, that all that their Lordships meant was that they were not giving a considered decision on the rights of an after-born son in general and in all their legal aspects, but were basing their conclusion on the assumption that the law was as stated by counsel. It is doubtful whether the decision of their Lordships given in such circumstances and with so much of cautious reservation, can be treated as having finally settled any of the vexed questions on this topic about which judicial opinion in India has been so sharply divided.[2]

(2) It is now fairly well settled that the coparceners in existence at the date of an alienation by the father or other member can either affirm the transaction at a later date or they may if they feel aggrieved by it challenge the same by instituting the appropriate suit within the period of limitation prescribed therefor. If they succeed in their challenge, the effect of it is that the property which went out of the family under the alienation is restored to it with the result that all those members of the family including those born into it subsequent to the alienation are entitled to the benefits of such success. In other words, the successful challengers who ex-hypothesi are the coparceners in existence at the date of the alienation are not entitled to appropriate to themselves the fruits of their victory to the exclusion of the other members of the family who were born subsequent to the alienation. This principle is implicit in the decision of the Privy Council in *Ram Kishore Kedar Nath* v. *Jainarain*[3], where the facts were these: The four sons of one Kedar Nath instituted the suit on 20th December, 1907, to set aside a disposition of part of their family properties in the year 1898 by their father in favour of the defendant Jainarain. The first plaintiff was born on 20th December, 1886. The other plaintiffs were born between 1892 and 1894. The court of appeal in India, held that so far as the first plaintiff was concerned his suit was in time, but that that it was barred as against his younger brothers who were born after the commencement of what was treated as the adverse possession of the defendant. Their Lordships, on appeal rejected this view in these words:

"It was however conceded before this Board, and as their Lordships think rightly conceded, that if the first plaintiff succeeds, his younger brothers born before a partition of the estate will be entitled to share in the relief.".

The decisions in *Tulshi Ram* v. *Babu*[4] and *Amrithalinga Thevan* v. *Arumugha Ambalagaran*[5] are also explained on this principle. These were cases where the alienee sought to enforce by suit his title under the alienation by one member of the family against not merely some or all the other members of the family who were in exis-

1. *Akhara Udasi Nirwani* v. *Swajpal Singh*, (1944) 2 M.L.J. 395 (P.C.) at p. 397.

2. See for example two extreme and divergent views in I.L.R. (1943) Bom. 423 and (1940) I.L.R. 20 Patna 727.

3. (1913) 25 M.L.J. 512 : L.R. 40 I.A. 213 : I.L.R. 40 Cal. 966 (P.C.).

4. (1911) I.L.R. 33 All. 654.

5. (1928) 28 L.W. 634.

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tence at the date of the alienation and were not parties to it but also against other members born in the family subsequent to the alienation. It was held that such after-born members were not precluded from resisting by way of defence the validity of the alienation as against them also, even though they were not in existence at the date of the transaction sought to be enforced, the principle being that the coparcener who was in existence on the date of the alienation and who was made a co-defendant along with the after-born coparceners "defends not only in his own interests but in the interests of the family and therefore are (including the later-born ones) who were members of the family at the time of the successful defence benefited by such defences"[1]. The decisions in *Bhup Kunwar* v. *Balbir Sahai*[2], and *Chandramani Prushti* v. *Jambeswara Rayagaru*[3], do not however strictly fit in with this principle, but rest on a wider conception of the rights of an after-born coparcener. The former decision is founded on the extreme view that an after-born coparcener has got an individual and inherent right to resist an alienation made anterior to his birth and such a right is not dependent for its effective exercise on there being in existence a coparcener who was alive on the date of the alienation. In that case the non-alienating coparcener who was in existence on the date of the alienation sued for setting it aside, but died during the suit. When the alienee later sought to enforce by his own suit the alienation against a coparcener, born after the alienation but during the pendency of the prior infructuous suit, it was held that such a later-born coparcener was not disentitled to contest the validity of the alienation. *Chandramani Prushti* v. *Jambeswara Rayagaru*[3], arose out of a simple mortgagee's suit for sale. On the date of the suit mortgages, the third defendant was a member of the joint family of the mortgagor. The second defendant was a son of the mortgagor and he was born after the execution of the mortgages sued on. The third defendant had previously instituted various legal proceedings for getting the suit mortgages invalidated in so far as they affected his interests, but he ultimately failed in those proceedings. He was therefore plainly barred by the rule of *res judicata* from contesting the validity of the suit mortgages in the later suit, and it was so held. The interest of the decision for our present purpose lies in this, that the learned Judges held that the second defendant though an after-born coparcener of the mortgagor was not disentiteld to contest the validity and binding nature of the mortgages, as against him stress being laid on the circumstances that on the date of the mortgages there was in existence a coparcener (*viz.*, the 3rd defendant) who had not consented to it. It is not clear whether the learned Judges would have reached the same conclusion even if the coparcener who was in existence at the date of the alienation was dead or had allowed his remedies for invalidating the same to be barred by lapse of time on the date when the subsequent born coparcener attacks or resists the transaction.

(3) It is not indubitably clear whether an after-born coparcener has any additional or other rights than those limited rights recognised by Courts like *Ram Kishore Kedarnath* v. *Jainarain*[4] and *Tulshi Ram* v. *Babu*[5]. It is from this point onwards that the case-law begins to disclose a bewildering conflict and the task of reconciling the many conflicting decisions and dicta and evolving from them a clear and consistent rule that will work in all situations is by no means easy. Before proceeding further, we may eliminate one case which on principle appears to be a plain one. Where the only non-alienating coparcener who was in existence at the date of the alienation dies subsequently and thereafter another coparcener is born in the family—after the usual period of gestation reckoned from the death of the first mentioned coparcener, it has been held that such a subsequently born coparcener acquires no rights whatever in the alienated property, not even the limited right of impugning the alienation. This was the actual decision in *Viswesswara Rao* v. *Surya Rao*[6].

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1. (1936) 70 M.L.J. 360, 372 : I.L.R. 59 Mad. 667, 684.
2. (1921) I.L.R. 44 All. 190.
3. (1930) 34 L.W. 598 : A.I.R. 1931 Mad. 550.
4. (1913) 25 M.L.J. 512 : L.R. 40 I.A. 213 : I.L.R. 40 Cal. 966 (P.C.).
5. (1911) I.L.R. 33 All. 654.
6. (1935) 70 M.L.J. 360 : I.L.R. 59 Mad. 667.

This conclusion accords with the theory that the cause of action for setting aside an alienation of family property is one that arises at the moment of the adverse alienation and abates with the death of those persons in whom such a cause of action was vested when it arose, that is the non-alienating coparceners who were in existence at the date of the alienation and is not revived by the birth of another coparcener after an interval of time exceeding the normal period of gestation computed from the death of the last survivor among such non-alienating coparceners. The discussion in *Visweswara Rao* v. *Surya Rao*[1], covers a much wider ground than was perhaps strictly necessary for the actual decision. But at the same time, the judgment of the Bench delivered by Stone, J., is valuable as containing an instructive exposition of the legal principles involved, besides furnishing an exhaustive anthology of the case-law on the subject.

It is a question of nicety whether the principle on which the decision in *Visweswara Rao* v. *Surya Rao*[1] is based can be extended to a situation where there is no "gap" separating the death of the non-alienating coparcener who was in existence at the date of the alienation, from the birth of a fresh coparcener, that is to a case where after the birth of a coparcener subsequent to the alienation, the coparcener who was alive at the alienation dies, leaving the later-born coparcener surviving him. If the correct principle is that the after-born coparcener has no independent cause of action apart from that vested in the non-alienating coparceners who were alive at the alienation, then the conclusion is irresistible that he has no right to impugn the alienation after the cause of action had become extinguished with the death of all those persons in whom it was vested when it arose even though the period of limitation reckoned from the date of the alienation has not run its course.

In *Ransdip Singh* v. *Parmeshwar Prasad*[2], the point is discussed from the aspect of the starting point of limitation for an action for setting aside an alienation such as that we have been considering. It was held that if the coparceners who were in existence on the date of the alienation allowed their rights to be barred by lapse of time, then the after-born coparcener was also equally barred even though the later-born coparcener might have been born before the expiry of the period of limitation prescribed for challenging the alienation. This necessarily implies not merely that the cause of action arises on the date of the alienation, but also that it vests in such of the other coparceners who were alive and not consenting thereto and in them only. It is interesting to note that in that case there was a clear "overlapping of lives" within the meaning of that phrase as used in *Akhara Udasi Nirwani* v. *Surajpal Singh*[3]. Nevertheless this circumstance was not considered by anybody concerned—Counsel or Judges—as of any significance and the decision went on the principle that the cause of action arose at the alienation and that the bar of limitation operating against a coparcener in existence at the time of alienation affects equally the subsequent born coparcener. It is worth quoting in this connection the following passage from *Visweswara Rao* v. *Surya Rao*[1].

"By parity of reasoning just as where the right of action possessed by the coparceners existing at the time of the alienation if barred is lost not only by them, but also by any member of the family later born if they allowed the period of limitation to expire, so it is also lost if those persons who were in existence at the time of the alienation lost that cause of action by death *before there came into existence an after-born child* for the after-born child has got no right or action in himself, no individual and separate cause of action that springs up immediately he is born, but his rights to contest, if any, is derived from the right, that those in existence at the date of the alienation who were not consenting had and that right is lost to him when it is lost to them and it is lost to them when they die or when they permit the period of limitation to expire.".

The words italicised emphasised the special feature of that case that there was a clear gap between the death of non-alienating coparcener and the subsequent birth of the objecting coparcener and this therefore made the case

1. (1935) 70 M.L.J. 36: I.L.R. 59 Mad. 667. I.L.R. 47 All. 165 (P.C).
2. (1924) 48 M.L.J. 29: L.R. 52 I.A. 69: 3. (1944) 2 M.L.J. 395 (P.C.).

before the learned Judges *a fortiori* one. But even if these words are deleted the passage will remain as an accurate and terse statement of the law.

Nearly eight months after the decision in *Ransdip Singh* v. *Parameswar Prasad*[1] their Lordships of the Privy Council gave their judgment in *Lal Bahadur* v. *Ambika Prasad*[2]. This decision is a landmark in the evolution of the law on the subject. Its exact scope and significance, have been the subject of considerable discussion among Judges and lawyers in India. In view of its importance the case merits a detailed examination. The facts of the case were as follows: Two Hindu brothers, Ambika and Adit, governed by the Mitakshara sued in 1919 for recovery of family properties alleged to have been improperly sold away by their grandfather Ram Din in 1904. The plaintiff's father Awadu Behari was alive on the date of the suit but his right to challenge the sale had become barred by then. The bulk of the consideration for the sale was applied in discharge of two mortgages created in 1895 over the family properties by Ram Din at a time when the plaintiff's father was an infant aged about 13 years. Of the two plaintiffs it was admitted that Ambika, the elder was a minor in 1904 though his exact age was a point of serious dispute. It was asserted by one party and denied by the other that Adit was born after the completion of the sale of 1904. Of the answers given by the purchaser under the 1904 sale to the attack made against it by the plaintiffs two alone survived before their Lordships Board. (1) The competency of each of the plaintiffs to maintain the suit was denied on the grounds (*a*) that Amibka was more than 21 years of age on the date of the suit and that therefore his remedy in respect of the 1904 sale was barred by lapse of time; (*b*) that Adit was not in existence at all on the date of the sale and had therefore no *locus standi* to question it. (2) On the merits, it was contended that the sale was, in any event, binding on the plaintiffs as having been effected for legal necessity and benefit and for discharge of the antecedent debts of their grandfather. Their Lordships first addressed themselves to the last mentioned contention with this remark: "If this answer of the appellant (alienee) be well founded, the other issue more technical in character and one upon which the Courts in India were actually divided becomes academic". Their Lordships decided this question of substance, *viz.*, "whether this (sale) deed was binding as having been for the benefit of the family and for payment of antecedent debts?", in favour of the alienee. They expressly state that in deciding this question of substance, they will "assume without deciding that the suit was maintainable by both respondents." So far the position is plain. But in discussing the binding nature of the sale of 1904 as against the plaintiffs, their Lordships scan with care the various items of consideration recited in the sale deed and as part of that investigation probe into the origins of the transaction in the mortgages of 1895, the discharge of which, as stated already, formed the bulk of the consideration for the impugned sale, and proceed to examine how far, if at all, those transactions of 1895 bound the plaintiffs. The following observations are important:

"The respondents, Plaintiffs in the suit are sons of Awadh Behari (. . . .) In 1895 they were still unborn. This as will later appear, is one of the most impotant facts in the case. It follows from it that these two mortgage deeds have always been binding on the respondents. The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated."[3] This is a clear and emphatic expression of opinion on a point which constituted an important step leading to the conclusion that their Lordships ultimately arrived at that the sale was binding on the plaintiffs. There is no doubt some apparent inconsistency in disclaiming an intention to decide the question on one portion of the case and expressly deciding that very question on the other portion of the case. But it is submitted that it is not permissible to neutralise or weaken the effect of their Lordships' express pronouncement on any such ground of inconsis-

1. (1925) 48 M.L.J. 29: L.R. 52 I.A. 69: I.L.R. 47 All. 165 (P.C.).
2. (1925) L.R. 52 I.A. 493: I.L.R. 47 All. 795 (P.C.).
3. (1925) L.R. 52 I.A. 443, 445: I.L.R. 47 All. 795 at 797 (P.C.).

tency. Further, it is worth stressing in this connection that so far as the 1895 mortgages were concerned both the plaintiffs were undoubtedly after-born coparceners. As regards the 1904 sale, Ambika was clearly not an after-born grandson and it was a matter of much uncertainty—no final finding on this point was given by their Lordships—whether Adit was or was not in existence at the date of the sale in 1904; so that on that part of the case which related to the competency of the plaintiffs to maintain the suit, no question of the rights of any after-born coparcener to impugn the antecedent sale really arose in the straight form in which it did actually arise with reference to the mortgages of 1895.

The learned Editor of the 10th edition of Mayne's Hindu Law comments at some length on this decision. (*See* pages 511 and 512, Para 399). He expresses the opinion that: "It may not be right to regard the observation of their Lordships which seem to confine the right to challenge alienations of family property to the coparceners alive at the date of the alienation and to deny such a right to a coparcener who though born subsequent to the alienation acquires an interest in the coparcenary property before the death of the objecting or non-alienating coparceners" as a decision on the question as the point was not considered. He states that it will be against the whole current of Indian authorities which cannot be deemed to be overruled by implication. Further, "If the observation means that coparceners born in the family subsequent to an alienation before the death of the other coparceners who could challenge it, have no right to the property and consequently no right to challenge the alienation, it would conflict with what was said by the Board in *Ramkishore* v. *Jainarin*[1] as well as with the cardinal principle of Hindu Law." With great respect, however, it is submitted that none of the considerations referred to are sufficient individually or cumulatively to deprive the clear pronouncement of their Lordships in *Lal Bahadur's case*[2] of its force as a binding precedent. In the setting in which their Lordships made the observation commented upon in Mayne's Hindu Law it is difficult to regard it otherwise than as a decision on the question. As to the remark that the observation is against the whole current of Indian authorities, it is by no means clear that the authorities are all one way, and even if some of the previous decisions of the Indian Courts are incompatible with their Lordships' pronouncement one need not shrink from treating those decisions as having been abrogated by implication. The so-called conflict between *Ramkishore Kedarnath* v. *Jainarain*[1] and the much discussed observation in *Lal Bahadur's case*[2] is more apparent than real. It is not also clear what is "the cardinal principle of Hindu Law" with which the above observation in *Lal Bahadur's case*[2] is said to conflict.

In *Rajah Vasi Reddi* v. *Lakshminarasimham*[3] Venkataramana Rao, J. in delivering the judgment of the Bench consisting of himself and Abdur Rahman, J., has expressed his considered dissent from Mayne's comment on *Lal Bahadur's case*[2]. His Lordship demonstrates that the case in *Ramkishore Kedarnath* v. *Jainarain*[1] does not enunciate any principle in conflict with the decision in *Lal Bahadur's case*[2]. But as the learned Judges in that case were prepared to rest their decision on a ground which they thought was a safer one, they closed the discussion with these inconclusive observations. "Much may be said in favour of either view and it may be that the view expressed in Mayne's Book is sounder. The scope and effect of the Privy Council decision in *Lal Bahadur* v. *Ambika Prasad*[2] may require consideration." These observations do not, however, detract from the force and cogency of their earlier remarks criticising Mayne's reading of *Lal Bahadur's case*[2]. In *Gujarat Oil Mills and Manufacturing Company* v. *Shakarbai*[4] a Bench consisting of Beaumont, C.J., and Sen, J. has interpreted *Lal Bahadur's case*[2] as a decisive authority against the after-born coparcener. According to this interpretation, the after-born coparceners have no rights at all in the alienated property except perhaps the limited right of "sharing in relief." (Vide *Ram Kishore Kedarnath* v. *Jainarain*[1])

1. (1913) 25 M.L.J. 512 : L.R. 40 I.A. 213 : I.L.R. 40 Cal. 966 (P.C.).
2. (1925) L.R. 52 I.A. 443 : I.L.R. 47 All. 795 (P.C.).
3. (1940) 1 M.L.J. 820 : I.L.R. (1940) Mad. 913.
4. I.L.R. (1943) Bom. 423.

that the non-alienating coparcener who was in existence at the alienation might ultimately obtain by carrying the attack against the alienation to a successful conclusion during his lifetime. It may be that this is an extreme view, but the result arrived at in that case appears to be inescapable on the strict logic of the principle on which *Lal Bahadur* v. *Ambika Prasad*[1] is based. It is not irrelevant to advert to one other aspect of *Lal Bahadur's case*[1]. There was nothing in that case to show that in 1904 the plaintiff's father had given his assent at any time to the mortgages of 1895; nor was there anything to show that in 1904 his rights to attack the said alienations of 1895 were barred by time. It is not apparent whether the significance of these two negative features of the situation in 1904 was fully appreciated by their Lordships when they held that the mortgages of 1895 "have always been binding on the respondents." The learned Editor of the 11th Edition of Mayne has not made any alterations in the text of the passage in the 10th Edition which contains the comments on *Lal Bahadur's case*[1] considered above. But, he has added a sentence to the text: "The question must be taken to be now concluded by the recent decision of the Privy Council in *Akhara Udasi Nirwani* v. *Surajpal Singh*[2] (Page 502, para. 399—Mayne's Hindu Law, 11th Edition ").

An endeavour has been made in the foregoing analysis to demonstrate that the *Akhara Udasi Nirwani* v. *Surajpal Singh*[2] cannot be treated as a considered pronouncement on the question having regard to the cautiously worded reservation about the corrections of the propositions of law "assumed" by their Lordships without discussion to be accurate and adequate for deciding the case before them. The remarks "that the whole current of" not merely "the Indian authorities" but their Lordships own previous decisions on the subject "which were neither referred to nor considered and cannot therefore be deemed to be overruled" apply with equal if not greater force to the instant decision[2], the "ratio" of which is contained in two sentences based on a concession made by Counsel assumed by their Lordships to be correct without any independent examination in the light of principles or precedents.

(4) and (5) Testing the actual result arrived at in *Akhara Udasi Nirwani* v. *Surajpal Singh*[2] in the light of the principles established by or deducible from the previous authorities it is submitted that the conclusion that the fourth defendant is entitled to contest the validity of the suit mortgage at a time when his elder brother who was alive on the date of the mortgage was dead is unsupportable. Such a conclusion, can, if at all, be supported only on the theory that a later-born coparcener like the fourth defendant has an individual and separate cause of action that springs immediately he is born, a theory that is inconsistent with *Ransdip Singh* v. *Parameshwar Prasad*[3] and which has been discarded as unsound on very cogent reasoning in *Visweswara Rao* v. *Surya Rao*[4] That even their Lordships were not prepared to base their decision on any such simple theory is clear from their invoking the principle of "overlapping of lives" which it would have been unnecessary to call into aid if the former theory could have furnished a sure basis for the decision. Further the limits of the exception created by the "overlapping of lives" have not been considered by their Lordships in all its bearings. The weakness of the decision on this point lies in not adverting to the implications arising out of the death of the eldest son without affirming or repudiating the mortgage. But even if the correctness of the conclusion that the fourth defendant is entitled to raise a contest about the validity of the mortgage is not open to question, there is certainly no justification either in logic or in the reason of the rule for extending that privilege to his younger brother the sixth defendant, who was born long after the death of the eldest son. To arrive at that result, the exception engrafted on the general rule should be read as wide enough to embrace within its ambit the overlapping of a portion of the life of a coparcener born after the alienation and

1. (1925) 52 I.A. 443 : I.L.R. 47 All. 795 (P.C.).
2. (1944) 2 M.L.J. 395 (P.C.).
3. (1924) 48 M.L.J. 29 : L.R. 52 I.A. 69 : I.L.R. 47 All. 165 (P.C.).
4. (1936) 70 M.L.J. 360 : I.L.R. 59 Mad. 667.

after the death of the only coparcener (besides the alienor) existing at the alienation, over a portion of the life of another coparcener also born after the alienation, but before the death of the non-alienating one who was alive at the time of the alienation. This, it is submitted, is not sound logic and it is doubtful whether it is good law. Their Lordships have not differentiated at all between defendants 4 and 6 as regards their rights to resist the mortgage. The point of our emphasis is that there is an important difference between them in their respective situations in the application of the exception to the general rule even as formulated by their Lordships. No portion of the life of the sixth defendant falls within any portion of the life of the eldest son and there was a clear gap between the death of the eldest son and the birth of the sixth defendant. The exception at any rate as enunciated by their Lordships will have no application to a coparcener in the position of the sixth defendant. It is respectfully submitted that in view of the not very satisfactory manner in which the question has been dealt with the decision in *Akhara Udasi Nirwani* v. *Surajpal Singh*[1] may not be taken as the final word on this subject, especially as it is in plain conflict with their Lordships' earlier pronouncement in *Lal Bahadur's case*[2]. We would conclude by expressing the hope that the Supreme Court of India on which the mantle of the Judicial Committee of the Privy Council has fallen, will consider itself free to re-examine the whole question and to declare the law authoritatively untrammelled by this precedent, when the appropriate occasion arises.

BOOK REVIEWS.

HINDU LAW IN BHARAT by M. N. SRINIVASAN, Advocate, High Court of Mysore, Third Edition, 1951. Published by Anandaram and Company, 439, IX Main Road, Malleswaram, Bangalore, 3. Pages 606. Price Rs. 20.

It is refreshing to go through the book under review as it is a treatise on Hindu Law in the proper sense of the word and not a mere jumbled up collection of case law, which unfortunately is what one finds in many books of law at the present day. The author has in his simple and straightforward language given the propositions of law as deducible from the cases decided. Nor has he shirked his duty as an author to give his own comments on points decided by the cases when he does not agree with them. The various headings under which each topic is discussed is not only exhaustive but is based upon a clear analysis of the whole subject. The time and thought bestowed on the subject by the author can perhaps best be realised only by reading through the book. The value of the book has been really very much enhanced by the well arranged and full index.

THE LAW OF ACCOMPLICES AND APPROVERS by Y. H. RAO, Assisted by Y. R. RAO, Advocates, 1951. Published by Criminal Law Publications, Gudur. Pages 248, Price Rs. 12.

We had, on a former occasion, an opportunity to review an earlier volume in the present series by the same authors and welcomed the attempt that was made to analyse the subject into its separate and component divisions and discuss the law with clarity and exhaustiveness. The present book, the second of the series continuing the same method of treatment and arrangement of the matter has, it must be said, elucidated the law clearly in regard to Approvers and Accomplices in the light of the numerous decisions on the subject. After a discussion of the case law, the propositions established by the cases are enumerated and the law on the subject is given. We look forward with interest to the other books of the series.

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1. (1944) 2 M.L.J. 395 (P.C.).
2. (1925) L.R. 52 I.A. 443 : I.L.R. 47 All. 795 (P.C.).